

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SELDEN CONVENIENCE FOODMART, INC.	:	ORDER
		DTA NO. 817531
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period June 1, 1994 through May 31, 1997.	:	

Petitioner, Selden Convenience Foodmart, Inc., 485 Old Country Road, Dix Hills, New York 11746, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1994 through May 31, 1997.

On September 27, 2001, the Division of Taxation filed a motion for an order dismissing the petition and granting it summary determination on the ground that petitioner failed to file a petition for a hearing within 90 days of the mailing of certain conciliation orders. Petitioner did not respond to the motion. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel). Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition following the issuance of certain conciliation orders.

FINDINGS OF FACT

1. Petitioner, Selden Convenience Foodmart, Inc. (“Selden”), filed a petition on January 31, 2000. Four assessment numbers are listed on the face of the petition as follows:

L-014031683	L-014454749
L-014383922	L-014019401-1

2. In a prior proceeding, the Division of Taxation (“Division”) sought dismissal of the petition as it applies to assessment numbers L-014031683 and L-014454749. These were notices of sales and use tax due issued to a Selden officer, Tabinda Mahmud. The Division's motion for dismissal was granted. In addition, the Administrative Law Judge Order directed that a hearing be scheduled to address the two notices of determination of sales and use tax due petitioned by Selden: assessment numbers L-014383922 and L-014019401-1.

3. Selden's petition is confusing because neither notices of determination nor conciliation orders were attached to the petition. However, assessment numbers L-014383922 and L-014019401-1 were clearly listed on the front of the petition, and two requests for conciliation conference bearing these assessment numbers were attached to the petition. Consequently, the petition was deemed to be a protest of notices of determination of sales and use taxes due for the period June 1, 1994 through May 31, 1997 (the period identified in the body of the petition).

4. The Division now brings the instant motion for dismissal of the notices of determination issued to Selden on the ground that the petition to the Division of Tax Appeals was not filed within 90 days of the issuance of conciliation orders pertaining to those notices.

5. In support of its motion, the Division submitted a Conciliation Order (CMS 155750) addressing assessment number L-012046019, issued for the period September 1, 1991 through May 31, 1994, and mailing documents pertaining to Conciliation Order 155750. Because this

notice was not one of the two Selden notices listed in the petition of January 31, 2000, the Division of Tax Appeals lacks jurisdiction to consider any issues relating to it. Accordingly, the Division's documents relating to assessment number L-012046019 will not be considered.

6. The Division also submitted evidence in support of its motion to dismiss the petition as it pertains to notice number L-014383922. This is one of the notices listed on the petition, and the Division of Tax Appeals does have jurisdiction with respect to this notice.

7. The Division's Bureau of Conciliation and Mediation Services ("BCMS") issued to Selden a Conciliation Order (CMS No. 164972), dated May 22, 1998, sustaining notice number L-014383922.

8. The affidavit of Carl Decesare, Assistant Supervisor of Tax Conferences, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the mailing documents including a document which lists the taxpayers to whom conciliation orders are being sent by certified mail on a given day. This document is referred to as a certified mail record ("CMR").

9. A clerk, as part of her regular duties, verifies that the names and addresses of taxpayers listed on the CMR are the same as those shown on the conciliation orders. The clerk then affixes a certified control number sticker to each envelope to be mailed that day. The clerk records each certified control number on the CMR next to the name of the person to whom the item of mail is to be sent. The envelopes containing the conciliation orders and the corresponding CMR are picked up by an employee of the Division's Mail Processing Center.

10. According to Mr. Decesare, each page of a certified mail record is a separate certified mail record for the conciliation orders listed on that page only, and each page contains spaces to

record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to affix his or her signature.

11. The copy of the one-page certified mail record attached to the Decesare affidavit contains a list of the conciliation orders issued by the Division on May 22, 1998. The certified control numbers on this document run consecutively from Z257569663 through Z257569676. All the names and addresses listed on the certified mail record have been redacted except the entry for Selden. Selden's name and address appears next to certified mail number Z257569675.

12. The CMR bears a date stamp of May 22, 1998 made by the Colonie Center branch of the U.S. Postal Service in Colonie, New York. A postal employee's initials verifying receipt appear on the bottom of the sheet. At the bottom of the page, the number "14" has been entered as the "Total Number of Pieces Listed by Sender," and the number "14" has also been entered as the "Total Number of Pieces Received at Post Office." There are 14 certified mail numbers listed on the CMR.

13. Attached to Mr. Decesare's affidavit as Exhibit "B" is a copy of the Conciliation Order, CMS No. 164972, signed by Michael A. Mancini, dated May 22, 1998, which denied petitioner's request and sustained statutory notice number L-01438922. The Division also submitted a letter from Tabinda Mahmud addressed to Michael A. Mancini which references CMS order 164972 issued to Selden. That letter was received by BCMS on July 6, 1998, indicating that a Selden officer actually received the Conciliation Order.

14. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S.

Postal Service. After a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, a member of the mail processing center staff delivers them to the Colonie Center branch of the United States Postal Service ("USPS") in Albany. The postal employee affixes either a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. The certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In this case, the postal employee wrote the total number of pieces, initialed the certified mail record, and affixed a postmark which indicates that, on May 22, 1998, 14 pieces of mail were received at the post office, including the one addressed to Selden. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

15. Selden's petition was sent to the Division of Tax Appeals by Federal Express ("FedEx"). The FedEx airbill shows that the petition was sent by priority overnight service for delivery on January 29, 2000, a Saturday. It was actually received by the Division of Tax Appeals on January 31, 2000.

16. Selden did not respond to the Division's motion.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted,

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is

presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

The proponent of a summary determination motion must make a prima facie showing of entitlement to a determination in its favor as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 925; *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316). The burden is then placed on the opponent of the motion to present facts sufficient to demonstrate an unresolved material issue which can be determined at a hearing (*Walski v. Forma*, 54 AD2d 767, 387 NYS2d 538). Petitioner did not respond to the Division's motion or in any other manner challenge the facts presented by the Division through affidavits and documents. Accordingly, petitioner is deemed to have conceded the correctness of those facts (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667). Inasmuch as there are no material and triable issues of fact presented, a determination may be issued, as a matter of law, in favor of any party.

B. A petition contesting a notice of determination of sales tax due must be filed within 90 days after the date of mailing of the statutory notice (Tax Law §1138[a][1]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order was issued (Tax Law § 170[3-a][e]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Carl Decesare and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders, and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Decesare and Baisley affidavits were followed with respect to Conciliation Order number 164972 issued to Selden. Selden's name and address appears on the certified mail record which bears a USPS date stamp of May 22, 1998 and the initials of a postal service employee. There are 14 certified mail control numbers listed on page one, and the USPS employee who initialed the certified mail record indicated that 14 items of mail were received for mailing. In short, the Division established that it mailed Conciliation Order number 164972 to Selden by certified mail on May 22, 1998.

Selden's petition was delivered to the Division of Tax Appeals on January 31, 2001, over two years from the date of mailing of the Conciliation Order. Since the petition was not mailed

to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear Selden's challenge to the Conciliation Order.

D. The Division offered no proof regarding notice of determination number L-014019401 which is included in Selden's petition.

E. The motion for summary determination filed by the Division of Taxation for an order dismissing the petition of Selden Convenience Foodmart, Inc. is granted in part and denied in part; the petition of Selden Convenience Foodmart, Inc. for review of notice number L-01438922 is dismissed with prejudice; a hearing will be scheduled as soon as practicable to review petitioner's protest of notice number L-014019401.

DATED: Troy, New York
November 15, 2001

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE